

RECENT ETHICS OPINIONS RAISE CONCERNS ABOUT SOCIAL MEDIA

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The use of Facebook, MySpace, LinkedIn, Twitter and other social media has drawn much attention recently because of its informality and the liberally-granted permissions to become friends. Recently, the NYSBA Ethics Committee and the Ethics Committee of the Association of the Bar of the City of New York have issued opinions regarding a lawyer's access to the public pages of these sites. NYSBA Opinion 843 asked whether a lawyer may view the public pages of a party, other than of the lawyer's own client, to gain information for litigation. ABCNY 2010-2 extended this question to the use of trickery to gain access to an unrepresented person's personal information. The practice has been sometimes called "pre-texting" in which the user can pretend to be another asking to "friend" someone with whom there is no logical connection.

With the advent of social media, attorneys must be reminded that pre-texting should be a violation of the rules against using false or misleading techniques. In the litigation setting, pre-texting is no different from a lawyer contacting a witness or another party and hiding his identity as a lawyer, a practice that in general has been severely criticized. Rule 8.4 of the Rules of Professional Conduct states that, "a lawyer...shall not...engage in conduct involving dishonesty, fraud, deceit or misrepresentation." And Rule 4.1 prohibits making false statements of fact to third parties. The ABCNY Opinion concludes that these Rules prohibit "friending" a person through social media under false pretenses. The NYSBA Opinion did not reach this question and concluded that obtaining public information from a person's social media site which is readily available to anyone would not be a violation of these Rules. This Opinion did discuss an interesting application of these principles by the Philadelphia Bar in which pre-texting involving a witness, rather than a party was prohibited. There, depending on whether the witness was represented, the practice is subject to Rules 4.2 or 4.3.

The conclusion is that lawyers should not be prohibited from using all means and media to gain publicly-available information; however, using deception or trickery to obtain information not publicly-available will violate the attorney's ethical responsibilities.